**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| BARBARA C. ABBOT,<br><br>Charging Party,<br><br>v.<br><br>SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | ) | Case No. SF-CE-1157<br><br>PERB Decision No. 751<br><br>June 29, 1989 |

Appearances: National Right to Work Legal Defense Foundation, Inc. by David T. Bryant, Attorney, for Barbara C. Abbot; Littler, Mendelson, Fastiff & Tichy by Terry Filliman, Attorney, for San Ramon Valley Unified School District.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the charging party, Barbara C. Abbot, from a Board agent's dismissal of her charge that the respondent, San Ramon Valley Unified School District (District), violated section 3543.5, subdivision (a), of the Educational Employment Relations Act (EERA).[1] Specifically, the

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5, subdivision (a), states:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

charge alleges that the District is liable for the exclusive representative's alleged failure to comply with the dictates of the United States (U.S.) Supreme Court's decision in Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292, 106 S.Ct. 1066 [121 LRRM 2793]. The Board agent found that the charge failed to state a prima facie case because neither EERA nor constitutional case law places upon the public employer the affirmative obligation to ensure that the exclusive representative adheres to the dictates of the Hudson decision.[2] For the reasons set forth below, we affirm the dismissal.

DISCUSSION

On appeal, Abbot relies on various passages from Hudson and its progeny which refer to the "government" or the "employer." Abbot also provides three examples where the remedy provided included injunctions against the employer. The import of these references, Abbot insists, is to create a duty on the part of the employer, as well as the union, to ensure that agency fees are collected and spent in a lawful manner.

The District, in its opposition to Abbot's appeal, maintains that neither Hudson nor any subsequent case places responsibility

[2]The Board agent found that the conduct of the District was authorized by statute. EERA section 3546 and section 3540, subdivision (1), provide that a public school employer and an exclusive representative may adopt an organizational security provision in a collective bargaining agreement. EERA section 3546 also allows for the holding of an agency fee election among bargaining unit members. Education Code section 45061 specifically authorizes the public school employer to make payroll deductions of agency fees pursuant to an organizational security provision in a collective bargaining agreement.

on the public school employer to see that a union's procedures are constitutionally sound. In the District's view, the references to the "government" do not place a specific duty upon the local public employer. Instead, the general references to government refer to the state or federal government and impose the duty to provide a mechanism to challenge the lawfulness of a union's collection or expenditure of agency fees.[3] According to the District, violations of agency fee payers' rights stem initially from government-sanctioned collective bargaining systems that allow agency fees to be charged and not from salary deductions by local public employers. Further, the District asserts that placing a duty on the employer in the manner urged by Abbot is incompatible with the employer's duty under EERA to deal with the union "at arm's length" and to avoid interfering in the union's internal affairs.

The key passage in Hudson appears at footnote 20, p. 307.

> We reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient. This contention misses the point. Since the agency shop itself is a "significant impingement on First Amendment rights," Ellis, 466 U.S., at 455, the government and union have a responsibility to provide procedures that minimize that

[3]The District admits that the employer may be a necessary party to a claim against the union solely for the purposes of effectuating an adequate remedy, i.e., enjoining further deductions, but distinguishes this from liability in the broader sense.

Abbot is a party to a charge filed against her exclusive representative, the San Ramon Valley Education Association, CTA/NEA. That case, No. SF-CO-304, 309, is now before the Board on appeal from an administrative law judge's proposed decision.

> impingement and that facilitate a non-union employee's ability to protect his rights. . . . Clearly, however, if a state chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decision-maker.

(Emphasis added.) In our view, these references to the "government" or "state," particularly the reference involving judicial review, connote the legislative and judicial capacities of government. While Hudson concerned the constitutionality of a procedure adopted by a union, with the approval of a local board of education, there was no discussion of any duty on the part of the government in its capacity as an employer. In fact, footnote 20 is the only passage in Hudson that speaks expressly of the responsibility of any entity other than the union. We believe the above passage refers to the duty of the governmental body which created the law sanctioning agency fees to apply and enforce that law in a manner consistent with the Constitution. It does not refer to an affirmative duty upon the government in its capacity as employer (in the instant case, a school district) to police the exclusive representative's compliance with Hudson.

Abbot also relies heavily on the following passage from the Seventh Circuit's decision in Hudson v. Chicago Teachers Union, Local 1 (7th Cir. 1984) 743 F.2d 1187 [117 LRRM 2314]:

> [M]ost violations of the First Amendment caused by union-security clauses . . . would go unremedied -- maybe even undetected -- if the employer had no duty to establish workable procedures for protecting dissenters' rights. We interpret the First Amendment to create such a duty. . . The

> defendants owe another constitutional duty to these plaintiffs * * * * [T]he public employer must establish a procedure. . . .[4]

Abbot notes that the U.S. Supreme Court affirmed the Seventh Circuit Court of Appeals and did not expressly disagree with the above passage. First, given the Supreme Court's failure to discuss any duty on the part of the employer and its admonition (475 U.S. 301) that it was not necessary to resolve all the questions raised in the decision below, we are unconvinced that the above passage was implicitly adopted by the Supreme Court. Second, the fact that the Seventh Circuit Court of Appeals referred to the "employer" is not necessarily of any significance in a public sector case. Since the employer is a subdivision of the "government" in the broad sense, some interchange of terms, albeit at the expense of confusion, is inevitable. Since concerns about the protection of First Amendment rights reflected in the passage above would be better satisfied by a judicial or quasi-judicial procedure for reviewing a union's calculation and use of agency fees, we find it unlikely that the Seventh Circuit Court of Appeals was speaking of the employing entity itself, as opposed to the government as a whole.

With one arguable exception, which will be discussed below, cases subsequent to Hudson also fail to establish a duty on the part of the employer to police a union's compliance with Hudson.

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[4]This "passage" is reproduced as presented in Abbot's appeal. It is actually an amalgamation of excerpts from three separate passages at 117 LRRM 2317, 2318 and is, therefore, somewhat misleading. In any event, the Seventh Circuit Court of Appeals did twice refer to the duties of the "employer."

Two of the cases cited by Abbot speak of the employer only in terms of providing injunctive relief against further deductions, pending the union's compliance with Hudson. (Lehnert v. Ferris Faculty Assoc. (W.D. Mich. 1986) 643 F.Supp. 1306 [123 LRRM 2361; Gilpin v. AFSCME (CD. 111. 1986) 643 F.Supp. 733.) In McGlumphv v. Fraternal Order of Police (N.D. Ohio 1986) 633 F.Supp. 1074, the court enforced an indemnification clause in the contract relieving the employer of any liability for the union's actions, but otherwise spoke only of the union's duty to provide procedures passing muster under Hudson.

Even Tierny v. City of Toledo (6th Cir. 1987) 824 F.2d 1497 [125 LRRM 3217], which thus far reflects the most expansive view of Hudson's requirements, fails to support Abbot's view. At page 1505, the Sixth Circuit Court of Appeals discussed the duty of defendant City of Toledo:

> Plainly the City of Toledo owes a duty to its non-union employees to assure that its ordinance will not permit the union to deprive them of their rights under the First and Fourteenth Amendments. Hudson. 106 S.Ct. at 1076 n.20. Beyond that, however, we do not endeavor to allocate which procedural minima or guidelines must be contained in the ordinance and which may properly be incorporated in the TPPA's [the union] plan.

(Emphasis added.) The court's discussion of the City of Toledo's duty focuses on the city's ordinance and the need for it to be applied in a constitutionally adequate manner; i.e., it is the city in its legislative capacity that is referred to, not its capacity as an employer. The remainder of the decision focuses on the union's responsibilities.

The confusion in the use of terms describing the government in its various capacities is, of course, not present when the employer is a private entity. In Ellis v. Western Airlines, Inc. and Air Transport Employees (S.D. Cal. 1986) 652 F.Supp. 938, 947 [127 LRRM 2550], the court described the employer as a peripheral defendant whose presence in the case was solely for the purpose of effectuating various remedies that may lie against the union:

> Western is a peripheral defendant, which only opposes the entry of a judgment that would create an affirmative obligation for it to "verify, review and/oversee that the agency fees . . . do not include amounts spent for non-collective bargaining purposes." Further, Western opposes any judgment declaring that it should "take any action with regard to the Plaintiff's employment status because of his failure to pay agency fees."
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> Western's objections are meritorious. This Memorandum Decision and Order do not create any affirmative duty for Western.
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> Western may, however, be required to insert as a provision of the collective bargaining agreement the remedy that this court ultimately approves as consistent with Hudson.

As noted above, there is only one reported case which appears to support Abbot's reading of Hudson. In Dixon v. City of Chicago (N.D. I11. 1987) 669 F.Supp. 851 [126 LRRM 2572], the court rejected the city of Chicago's argument that it had no duty to ensure or establish the constitutionally adequate procedures described by Hudson. The court first stated that the administration of an agency shop by a public employer constitutes the state action necessary to a constitutional claim brought

under section 1983 of the Civil Rights Act of 1871 (42 U.S.C, section 1983). Next, the court relied on the reference to the responsibility of the "government" at footnote 20 of the Hudson decision. Lastly, the court concluded that the city of Chicago's obligations were not discharged by the existence of the Illinois Labor Relations Board because of the court's view that that board does not have jurisdiction over such disputes. The availability of the courts to hear constitutional challenges to agency fee procedures was not discussed at all.

We do not find the court's analysis persuasive. The court first errs by assuming that the public employer's agreement to an agency shop provision in a collective bargaining agreement is the state action that is essential to establishing a First Amendment claim. Instead, the critical state action is found by virtue of the exaction of agency fees pursuant to statutes creating a state-sanctioned collective bargaining system. (See Ellis v. Brotherhood of Railway, Airline and Steamship Clerks (1984) 466 U.S. 435, 104 S.Ct. 1883; Ellis v. Western Airlines, Inc., supra; Smith v. United Transportation Union, Local No. 81 (S.D. Cal. 1984) 594 F.Supp. 96 [117 LRRM 3217].)

The Dixon court's analysis of the reference to "government" in footnote 20 of the Hudson decision fails for the same reasons we discussed above in analyzing a nearly identical argument put forth by Abbot in her exceptions to the proposed decision. We will not repeat that discussion here, but suffice it to say that, when viewed in context, the reference to "government" most

logically connotes not the public entity's capacity as employer, but the legislative and judicial capacities of the governmental body which created the law under which agency fees are exacted.

To the extent that the court in Dixon relied on the perceived lack of jurisdiction of the Illinois Labor Relations Board, the case is clearly distinguishable. There is no question but that PERB has jurisdiction over agency fee disputes arising under EERA. (See Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43; King City High School District Association, et al. (Cumero) (1982) PERB Decision No. 197, review pending, Cal.Sup.Ct.) Moreover, the Board has adopted regulations governing agency fee procedures (Cal. Admin. Code, title 8, sec. 32990 et seq.).

While the case law thus far fails to establish any independent affirmative duty upon the public employer to ensure the constitutional adequacy of the exclusive representative's collection and expenditure of agency fees, there are also several practical reasons why creating such a duty makes little sense. A public school employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate. It is this Board, in the first instance, that must determine if a union's actions are violative of EERA.[5] In addition, the courts may determine if a

[5]PERB has exclusive, initial jurisdiction to resolve unfair practice claims arising under EERA. (San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1; see also EERA section 3541.5.)

union's actions violate the Constitution. To say that the employer is liable if it fails to ensure the adequacy of the union's procedures is to force the employer to make its own determination of the lawfulness of the procedures.

In addition to the lack of legal authority to make such determinations, the employer can hardly be expected to be disinterested. To avoid liability, the cautious employer may either refuse to deduct agency fees because of perceived procedural inadequacies, or simply refuse to ever include agency fees in the contract. This would result in the effective elimination of agency fees. Since the EERA expressly authorizes such fees,[6] such a result would constitute abrogation of the statute.

Indeed, the role of the employer urged by Abbot is incompatible with the entire notion of collective bargaining. The "arm's length" relationship required by collective bargaining recognizes that the employer and the union have conflicting interests. Those conflicting interests obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them. Moreover, since the exaction of agency fees is fundamentally a matter between the exclusive representative and bargaining unit members, the creation of a duty such as that urged by Abbot would conflict

[6]EERA section 3546 states that "organizational security" is within the scope of representation. Section 3540.l(i) defines "organizational security" as either an arrangement providing for maintenance of membership or an arrangement providing for fair share fees.

with the employer's statutory duty to refrain from interfering in the administration of the union. EERA section 3543.5(d) states that it shall be unlawful for a public school employer to:

> Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

In sum, the creation of a duty on the part of the employer, as urged by Abbot, is not supported by existing case law and would be in clear conflict with the dictates of EERA. In any event, absent an antecedent appellate court decision, it is not within our authority to refuse to enforce some portion of the statute because we view it as unconstitutional.[7] As the District readily admits, and as is reflected in the case law, in some cases the employer may be a necessary party to a claim against the union for the purposes of injunctive relief. As noted by the court in Ellis v. Western Airlines. Inc.. supra, in such cases the employer is only a peripheral defendant. Absent evidence

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[7]Article III, Section 3.5 of the California Constitution states, in pertinent part:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
> . . .

that the employer actively conspired with the exclusive representative to deprive agency fee payers of their rights, we conclude that there exists no independent claim against the employer.

## ORDER

For the reasons discussed above, the unfair practice charge in Case No. SF-CE-1157 is DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Members Porter and Shank joined in this Decision.